IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICARDO C. HERRING,	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. AMD 01-3824
	:	
TOMMY G. THOMPSON,	:	
SECRETARY OF HEALTH AND	:	
HUMAN SERVICES,	:	
Defendant	:	

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MEMORANDUM

Plaintiff, Ricardo C. Herring, a federal employee, filed this discrimination case when he failed to obtain a promotion. Discovery has been completed and the defendant has filed a motion for summary judgment. No hearing is necessary. For the reasons stated herein, I shall grant defendant's motion.

I. The Facts Stated in the Light Most Favorable to Herring

Herring is employed by the National Institutes of Health ("NIH"), Office of Research Services ("ORS"), Division of Engineering Services, as a Senior Architect at the GS-14 level. Herring began his employment with NIH in 1989. After working in facilities planning at ORS for more than eleven years, he currently works in the Design Construction and Alteration Branch. The present dispute arose when the agency announced a vacancy for the position of Director, Office of Planning. The selectee would serve as an advisor to the Associate Director for Research Services and NIH management on a broad range of issues involving a variety of facilities and facility-related planning, transportation, environmental planning and energy conservation, developing and managing a coordinated building and

space program for NIH and providing guidance and technical support to the NIH community to assess and justify space needs.

Seven NIH employees, including Herring, applied for the position. Herring was one of four African-American males in that group, together with two white females. A Qualification Review Board ("QRB"), which consisted for four voting members, convened and reviewed the applications. The QRB consisted of three white males and one white male of Hispanic ethnicity. Also present were two non-voting attendees: a white female who served as a technical advisor, i.e., as a human resources assistant, and an African-American female, who performed an equal employment opportunity function, i.e., she was there to ensure regularity in the process and that all applicants were given fair consideration.

The QRB separately discussed and rated the merits of each applicant. The QRB ranked each applicant according their Knowledges, Skills and Abilities ("KSA"), particularly addressing each candidate's ability to provide direction and leadership, to communicate orally and in writing, and to provide management oversight in such areas as strategic planing, change management, project management and policy development. This was strictly a "paper" review of the applicants' written submissions. Herring received a total KSA score of 15. The two female applicants each scored higher: Cyrena Simons-- 19.5, and Stella Fiotes-- 24. (Apparently, because Simons was already working at the GS-15 level, she would have qualified for further consideration regardless of her score.) The QRB members decided that a "natural break" among the scores of the seven applicants was present between the top two applicants and the remainder of the applicant pool; thus, although the QRB rated Herring

as "qualified," it rated both Simons and Fiotes, and only them, as "best qualified." Consequently, the QRB forwarded only the applications of the top two candidates to the selecting official, Stephen A. Ficca, a white male.

Ficca requested that the QRB interview the two recommended candidates to formulate the QRB's opinion of the candidates beyond that derived solely from the written applications. After separately interviewing both candidates, the QRB agreed that both should be recommended to Ficca for further consideration. On June 22, 2000, after reviewing the QRB's recommendations, and personally interviewing both candidates, Ficca announced Fiotes would fill the position. Upon learning of his non-selection, and, in particular, because he was disturbed that he had not even been afforded an interview (and also because this was another in a long line of failed attempts at promotion), Herring sent Ficca an e-mail message complaining that he thought the selection process was tainted by race discrimination. On June 30, 2000, Ficca responded, stating that the rating and ranking of candidates for the position had been fair and impartial.

Another applicant, Clarence E. Dukes, also an African-American male, requested specific feedback on his application and, particularly, on his KSA scores. In response (and perhaps for other reasons as well), Sue Hickman, the technical advisor to the QRB, asked the QRB to reconvene to review once again the applications. The QRB met in August 2000 and conducted a review following the same process. Thereafter, the QRB compared its previous scores to the results from the more recent applicant evaluation and found no significant differences between the two evaluations. Furthermore, although, during the first

review process, the QRB did not take any notes (other than the raw numerical rating of each candidate), handwritten notes were prepared by at least one of the QRB members during the second review.

Meanwhile, on July 11, 2000, Herring sent a detailed letter to the agency EEO office asserting that his non-selection was motivated by discrimination. He asked that his complaint be investigated. In response to Herring's complaint, an inquiry was conducted, which yielded a ten page report, supported by exhibits, finding no indication of discrimination. In late January 2001, Herring was provided a copy of the Report of Inquiry, and was informed of his right to file a formal EEO complaint. In early February 2001, Herring filed a Formal Complaint of Discrimination, alleging that he was the victim of discrimination based on his race when he was not selected for the position.

Subsequently, the EEO office conducted an investigation and a Report of Investigation (finding no indication of discrimination) was completed on or about July 23, 2001. The report was delivered to Herring on or about August 8, 2001, together with a letter informing Herring of his right to either request a hearing before an ALJ and receive a final agency decision, or to request an immediate final agency decision. On August 31, 2001, Herring requested a final agency decision and elected not to request a formal administrative evidentiary hearing. (As it happened, a formal evidentiary hearing in relation to the proceedings to fill the vacancy at issue here was conducted at the request of one of the other African-American applicants and an ALJ found no evidence of race discrimination in the non-selection of that applicant.)

II. Summary Judgment Standards

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). A fact is material for purposes of summary judgment, if when applied to the substantive law, it affects the outcome of the litigation. *Id.* at 248. Summary judgment is also appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49. "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See Celotex Corp*., 477 U.S. at 324; *Anderson*, 477 U.S. at 252; *Shealy v. Winston,* 929 F.2d 1009, 1012 (4th Cir. 1991). Of course, the facts, as well as the justifiable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indust. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587-88 (1986). The court, however, has an affirmative obligation to prevent factually

unsupported claims and defenses from proceeding to trial. *See Felty v. Graves-Humphreys* Co., 818 F.2d 1126, 1128 (4th Cir. 1987).

III. Analysis

Title VII of the Civil Rights Act of 1964, as amended, provides, *inter alia*, that it is unlawful for an employer "to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1).

In discrimination cases brought pursuant to Title VII, the plaintiff bears the burden to initially establish a prima facie case of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In order to make out a prima facie case of discriminatory failure to promote, Herring must show that: (1) he is a member of a protected group, (2) he applied for the position in question, (3) he was qualified for the position, and (4) in the circumstance when the vacancy does not remain open, evidence that his race was a factor considered by his employer in not granting him the promotion. *Alvarado v. Board of Trustees*, 928 F.2d 118, 121 (4th Cir. 1991) (adopting the district court's modified *McDonnell* test); *Carter v. Ball*, 33 F.3d 450 (4th Cir. 1994); *see Green*, 411 U.S. at 802.

In *Nichols v. Harford County Bd. of Educ.*, 189 F. Supp. 2d 325 (D. Md. 2002), I stated the now familiar litany as follows:

> [o]nce the plaintiff establishes a prima facie case, a presumption

> of discrimination arises and the burden of production is placed on the employer to articulate a legitimate nondiscriminatory reason for the adverse employment decision. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993) (*citing Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)). Because the employer's burden is one of production and not of persuasion, it "is not required to prove absence of a discriminatory motive, but merely articulate some legitimate reason for its action." *E.E.O.C v. Clay Printing Co.*, 955 F.2d 936, 941 (4th Cir. 1992) (internal quotation marks omitted) (*quoting E.E.O.C. v. Western Electric Co.*, Inc., 713 F.2d 1011, 1014 (4th Cir. 1983)). If the employer meets this burden, the presumption of discrimination is eliminated, and the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that the employer's nondiscriminatory reasons are pretextual and that the adverse employment action was actually taken because of the employee's race or sex. *Hicks*, 509 U.S. at 511.

Nichols, 189 F. Supp. 2d at 340-41.

The Supreme Court clarified the plaintiff's burden at the pretext stage in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). The Court reiterated that evidence of pretext, combined with the plaintiff's prima facie case, does not compel judgment for the plaintiff, because "it is not enough . . . to disbelieve the employer; the factfinder must [also] believe the plaintiff's explanation of intentional discrimination." *Reeves*, 530 U.S. at 147 (*quoting Hicks*, 509 U.S. at 519). However, *Reeves* made plain that, under the appropriate circumstances, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.*

A. Prima Facie Case

The first and second elements of a prima facie case are not in dispute here. As for the third element, defendant argues that, although the QRB rated Herring as "Qualified" for the position, because Herring did not make the Best Qualified List ("BQL"), he was not an eligible candidate for selection, and therefore he cannot make out a prima facie case. I do not find this contention persuasive, although there is some case support for the argument. *See Axel v. Apfel*, 171 F. Supp. 2d 522, 529 (D.Md. 2000). While it is true that the overwhelming majority of reported cases alleging a discriminatory non-promotion involve plaintiffs who have made the BQL,[1] it simply cannot be overlooked that in the case at bar, Herring was found to be "qualified" and, more important, his core contention is that, as a result of discriminatory animus, he failed to be placed in the "best qualified" category in the first instance. Establishing a prima facie is a "relatively easy test," *see Young v. Lehman*, 748 F.2d 194, 197 (4th Cir. 1984), and is "not onerous." *Burdine,* 450 U.S. at 253 (The "burden of establishing a prima facie case of disparate treatment is not onerous."). Accordingly, this element is satisfied.

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[1]*E.g.*, *Rios v. Rossotti*, 252 F.3d 375 (5th Cir. 2001); *Arnold v. United States DOI*, 213 F.3d 193 (5th Cir. 2000); *Lennon v. Rubin*, 166 F.3d 6 (1st Cir. 1999); *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986); *Krodel v. Young*, 242 U.S. App. D.C. 11 (D.C. Cir. 1984); *Porter v. Schweiker*, 692 F.2d 740 (11th Cir. 1982); *Nolan v. Cleland*, 686 F.2d 806 (9th Cir. 1982); *Toney v. Bergland*, 207 U.S. App. D.C. 138 (D.C. Cir. 1981); *Orenge v. Veneman*, 218 F. Supp. 2d 758 (D. Md. 2002); *Jones v. Barnhart*, 215 F. Supp. 2d 1195 (D. Kan. 2002); *Sanders v. Veneman*, 211 F. Supp. 2d 10 (D. D.C. 2002); *Shin v. Shalala*, 166 F. Supp. 2d 373 (D. Md. 2001); *Brucks v. O'Neill*, 184 F. Supp. 2d 1103 (D. Kan. 2001); *Sanders v. Veneman*, 131 F. Supp. 2d 225 (D. D.C. 2001); *Yap v. Slater*, 165 F. Supp. 2d 1118 (D. Haw. 2001); *Bostron v. Apfel*, 104 F. Supp. 2d 548 (D. Md. 2000); *Venable v. Apfel*, 19 F. Supp. 2d 455 (M.D. N.C. 1998); *Fallacaro v. Richardson*, 965 F. Supp. 87(D. D.C. 1997); *Barvick v. Cisneros*, 941 F. Supp. 1007 (D. Kan. 1996); *Khan v. Maryland*, 903 F. Supp. 881 (D. Md. 1995); *Parrott v. Cheney*, 748 F. Supp. 312 (D. Md. 1989); *Simmons v. Marsh*, 690 F. Supp. 1489 (E.D. Va. 1988).

In addition, defendant argues that Herring fails to meet the fourth element of the prima facie case, i.e., that Herring cannot demonstrate he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. Because the two people selected as "best qualified" were white applicants, however, i.e., applicants who are not members of plaintiff's protected group, the record evidence provides a basis for an inference of intentional discrimination. *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996). Accordingly, I conclude that Herring has established a prima facie case of race discrimination.

B. Legitimate, Nondiscriminatory Reason

The burden of production thus shifts to defendant to articulate a legitimate, nondiscriminatory reason for Herring's non-selection. Manifestly, defendant has effectively rebutted the inference of discrimination by its showing that Herring was not selected for further consideration by the selecting official because the agency concluded that he was not one of the best qualified candidates for the position. The QRB reviewed the applications twice and in each round, the QRB rated and scored the applicants separately. Each time, the QRB assigned each applicant a score after considering the applicant's performance appraisals, awards received, education and training. In each round, Fiotes received the highest rating. Further, Herring's KSA score did not increase with the re-review, nor did his ranking among the applicants change. Herring does not argue or even suggest that the decision of the QRB to identify a "natural break" among the candidates was in any way an indicium of discriminatory motivation; rather, as discussed below, he simply contends that

he should have rated higher than the two applicants selected as "best qualified." Finally, the record is permeated with attestations by both the voting as well as the non-voting members of the QRB panelists (as well as the selecting official) that the rating and ranking (and the ultimate selection of one candidate to fill the position) was based solely on the QRB's good faith discussion of each candidate, and that none of the scores were racially motivated. When an employer gives such a legitimate, nondiscriminatory reason for an employment decision, it is not the province of the court to decide whether the selection criteria, or the process by which they were applied or implemented, were wise, fair or even correct, so long as they truly were the reasons for the employment action. *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000). Accordingly, defendant has met its burden.

C. Evidence of Pretext

Thus, resolution of the motion for summary judgment hinges on the issue of pretext. The Fourth Circuit has noted, in *Dennis v. Columbia Colleton Med. Ctr.*, 290 F.3d 639 (4th Cir. 2002), as follows:

> [u]nder the *McDonnell Douglas* framework, once an employer has met its burden of producing a legitimate nondiscriminatory explanation for its decision, the plaintiff is afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). That is, [the plaintiff] could attempt to establish that [he] was the victim of intentional discrimination by "showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256.

Dennis, 290 F.3d at 646.

More particularly, the Fourth Circuit has acknowledged two ways in which a plaintiff may establish falsity of an ostensible non-discriminatory reason to prove pretext and, ultimately, intentional discrimination. First, "[o]ne way to prove the plaintiff's case would certainly be to show that her qualifications were so plainly superior that the employer could not have preferred another candidate." *Id.* at 648, n.4. Second, Herring may also demonstrate that the totality of circumstances establishes that the defendant's proffered reason, although factually supported, "was not the actual reason relied on, but was rather a false description of its reasoning . . . manufactured after the fact." *Id.*

Herring pursues both avenues in his attempt to demonstrate that defendant's proffered explanation for his non-selection was a pretext for discrimination. Herring first argues that he was the most qualified candidate for the position. Additionally, Herring argues that evidence of contradictory explanations and "suspicious circumstances" surrounding the conduct of the QRB suggests that defendant is covering up a discriminatory motive. These contentions are unavailing.

1. Relative Qualifications

To project evidence of pretext under the first tack, Herring must demonstrate that "[his] qualifications were so plainly superior that the employer could not have preferred another candidate." *Id*. Herring devotes a substantial portion of his brief to his argument that he was the best qualified applicant for the position.[2] Herring reiterates repeatedly the

[2]Herring bases this segment of his argument on a Tenth Circuit case, *Luna v. City & County of Denver*, 948 F.2d 1144, 1149 (10th Cir. 1991). *Luna* held that the "totality of

(continued...)

information from his resume in an attempt to show that– objectively viewed, he claims-- he was the best qualified applicant for the position. He selectively compares segments of Fiotes' application to his own, in an effort to demonstrate his own superiority. Predictably, this attempt to have the court and ultimately the jury serve as a super selection board fails. While the levels of professional experience of Herring and Fiotes differ somewhat, the record compels the conclusion that both were qualified individuals who possessed various strengths that an employer would find valuable.

In *Obi v. Anne Arundel County*, 142 F. Supp. 2d 655 (D. Md. 2001), I considered a similar attempt by a non-selected plaintiff to bolster his subjective belief that his qualifications were superior to other candidates, and that the employer failed to evaluate the candidates in a manner the plaintiff thought equitable. In the end, I stated that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Id.* at 665 (*citing Burdine*, 450 U.S. at 259 (internal citations omitted)); *see also Wileman v. Frank*, 979 F.2d 30, 38 (4th Cir. 1992)("While this court may disagree with

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[2](...continued)
circumstances" supported a district court's determination after a bench trial that the defendant's articulated reason for not selecting plaintiff was pretextual because, *inter alia*: (1) the employer had a bad track record of race discrimination against employees; (2) the plaintiff maintained an exemplary record throughout his thirteen yeras of service with the employer; (3) the plaintiff's tenure as an employee with defendant was nearly six times as long as the selectees; and (4) the plaintiff was most qualified for the positions. *Id*.

the Postal Service's determination that Wilderson and Coger were the superior candidates . . . we simply cannot conclude, based upon the record, that the Postal Service's proffered justifications for preferring Wilderson and Coger over the appellee were so unworthy of credence as to support a finding of discriminatory intent."); *Dennis*, 290 F.3d at 648 n.4.

Although a plaintiff may present an argument "that he was the better candidate, courts are not to impose their own judgments for nondiscriminatory employer decisions. Absent a showing by plaintiff sufficient to raise an inference of pretext, [an employer] is free to name an experienced . . . official to head the . . . department instead of another employee with superior . . . qualifications." *Obi*, 142 F. Supp. 2d at 666 (*quoting Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998)("While Causey may have been qualified to fill the . . .Chief position, this Court is not in a position to second guess executive hiring decisions that are based on legitimate, non-discriminatory rationales such as superior administrative experience.")).

The QRB clearly thought Herring was *qualified* for the job. Further, there is no doubt that Herring relies on more than merely bald or conclusory allegations in his attempt to assert the superiority of his application. Herring's application is replete with examples of his ability to provide leadership and experiences demonstrating that he is capable of communicating both orally and in writing. In addition, his exemplary evaluations, awards and commendations, particularly at NIH, along with his tenure of seventeen years of federal service and eleven years with NIH, further illustrate that he was likely capable of performing the requirements of the position for which he applied.

To demonstrate pretext, however, Herring must show that his qualifications were so *plainly superior* that the employer could not have preferred another candidate. Herring does not meet this heavy burden. The QRB reasonably concluded that not only was Fiotes qualified, but that Fiotes submitted the richest application for the position by a significant margin. Fiotes is a registered architect with twenty years of experience, during which she demonstrated leadership abilities in positions in facilities management, space programming, and transportation and environmental planning, all of which are characteristics that would be highly-valued by a superior looking to fill the position. Herring argues that Fiotes's application lacks examples of leadership and, instead, is filled with accomplishments that seem to be more aptly described as signaling a "cooperative" character rather than a character for "leadership." This is untrue as a matter of fact, and, more fundamentally, is really argument, not an assertion of "fact" at all. Her application shows Fiotes has demonstrated leadership in a full range of facilities and facilities-related planning activities including, *inter alia*, directing the development of NIH master plans, coordinating and overseeing an extensive environmental study and review process, and planning numerous technical planning studies.

Although Herring demonstrates he was qualified for the position, even viewing all the facts in a light most favorable to Herring, he does not demonstrate that his qualifications are so *plainly superior* to Fiotes' qualifications that the members of the QRB could not have preferred her in the absence of some ulterior motive such as a discriminatory desire to deny the position to Herring. Thus, Herring has failed to generate a dispute of fact as to pretext

through a showing of *plainly superior* qualifications.

2. Circumstantial Evidence of Racial Animus

Herring also argues that the agency's history of non-promotion of people of color into higher grades and discrete aspects of the promotion process itself create a set of "contradictions" and "suspicious circumstances" sufficient to generate a dispute of material fact as to the *bona fides* of defendant's non-discriminatory explanation for Herring's non-selection. I disagree. Herring has ably cobbled together a collection of criticisms of the process used to fill the vacancy at issue. Nevertheless, his criticisms do not suffice to undermine the *bona fides* of the agency's conclusion that Herring was not one of the best qualified applicants.

a. History of Non-Promotions

Herring contends that the QRB members had a weak record for promoting or selecting African-Americans for high level positions; he also would rely on his own inability to move beyond the GS-14 level at NIH. Apparently, Herring has been passed over for promotion to GS-15 on seven occasions. Herring asserts that when the several members of the QRB panel selected applicants for prior vacancies, none of them ever selected an African-American candidate to fill higher GS positions. Herring also alleges that NIH has a track record of not providing minority graduates of its management training program with promotions to supervisory positions, but he does not project any evidence to support these claims.

To be sure, prior acts of discrimination can be highly relevant to demonstrate a

discriminatory motive or intent. *See Hurley v. Atlantic City Police Dep't.*, 174 F.3d 95, 111 (3rd Cir. 1999); *Morris v. WMATA*, 702 F.2d 1037, 1046 (D.C. Cir. 1983). However, an employer's employment statistics have little or no probative value as to the existence *vel non* of a specific intention to discriminate as to a particular adverse employment decision. *Jamil v. White*, 192 F. Supp. 2d 413, 420 (D.Md. 2002)(*citing Bostron*, 104 F. Supp. 2d at 554-55), *aff'd*, 55 Fed.Appx. 658, 2003 WL 257499 (4th Cir. February 7, 2003).[3] Under Herring's seeming theory, a person in a protected class need only be rejected for promotion some minimum number of times, and on that basis alone, could survive summary judgment in a failure to promote case. Of course, this is not the law.

b. The Promotion Process

Herring contends that the QRB and Ficca, the selecting official, committed several violations of agency policies which, taken together, create sufficiently suspicious circumstances to raise a doubt as to the existence of pretext. Herring cites: (1) the fact that supervisory personnel served on the QRB; (2) the fact that no "subject matter expert" served on the panel; (3) the circumstances surrounding the QRB's re-review of Herring nearly five months after the QRB had officially considered the candidates; (4) QRB's failure to refer all candidates for interview by the selecting official; and (5) certain race-based comments made

[3]A pattern or practice of discrimination is present only when a company repeatedly, routinely, or generally engaged in behavior which violates applicable anti-discrimination laws. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977). Herring's allegations fall short of such a demonstration. Moreover, even if such evidence were present here, and it is not, an individual employee may not bring a private, non-class cause of action for pattern or practice discrimination under Title VII. *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998).

at the beginning of the QRB's deliberations. Having carefully considered Herring's contentions in these regards, I am persuaded that neither singly nor in the aggregate do these contentions generate a dispute of material fact as to pretext.

i. Supervisory Personnel Serving on QRB

Herring argues that because QRB members were familiar with several of the candidates before the application process, they violated a QRB policy that required QRB panelists to recuse themselves in these situations. Susan Hickman, the technical advisor to the QRB, stated that the composition of the QRB is decided before applications are submitted and the panel, therefore, could not know the identity of the applicants in advance. She added that if a QRB member has a relationship with an applicant such that he or she is familiar with the applicant's performance, they are required to recuse. Such a commonsense notion would certainly be expected in a competitive selection environment.

Several members of the QRB did have knowledge of at least one candidate's performance. Nevertheless, defendant contends that an EEO specialist was sitting with the QRB to ensure that only information contained in the candidate applications would be discussed and considered by the QRB. The EEO specialist admitted that she could not determine independently whether any member of the QRB should have recused.

Although the failure to recuse may have been a procedural flaw in the selection process in some imagined though unproven way, there has been no substantial showing that any member of the QRB used any prior personal knowledge of the applicants to discriminate against any applicant on account of race. This procedural flaw does not appear probative as

evidence of pretext for discrimination. An applicant for a promotion is no more entitled to a "perfect" process than is a litigant in court entitled to a "perfect" trial. Herring's speculative suggestion that an inference of a discriminatory motive is supported on this record must be rejected.

ii. No Subject Matter Expert

Herring asserts that the QRB members were not subject matter experts because no member was an expert in architectural engineering, the technical field most heavily related to the vacant position. Susan Hickman testified, however, that QRB members are considered subject matter experts because they are, in some respect, experts in the area of the vacancy which is being filled. Subject matter experts, she explained, are individuals having unique skills and knowledge (including scientific knowledge) that human resource specialists (like herself) may not have. Hickman further attested that "knowledge of the organization and leadership" are also considered in composing a QRB. Because "leadership ability" was a key to filling this position involving significant supervisory responsibilities, familiarity with the organization could constitute a subject matter expert for this position opening.

Herring concedes that the QRB included one engineer but argues that the other three were not subject matter experts in technical matters related to the position. (The others had experience in "quality management," biology, and facilities management.) Herring's principal contention seems to be that there should have been a senior-level architect on the QRB. It is clear from Hickman's testimony, however, that although none of the QRB members was an expert in architectural engineering, all had some expertise in an area related

to the requirements of the position. Moreover, it is undisputed that the vacant position, although heavily related to architectural engineering, was not an architectural job.

In any event, Herring's belief that the hiring policy requires a "subject matter expert" to be a technical experts appears to be a misinterpretation of Hickman's testimony. Although the QRB panelists are not all experts in architectural engineering, they all have expertise in areas of the vacancy that are quite valuable in helping assess the qualifications of each of the applicants. Moreover, the fact that QRB panelists are not all architectural engineers would not have adversely affected Herring, or any of the other applicants, because of their race, and would not constitute evidence of pretext for discrimination.

iii. The Re-Review of Applications

Herring next argues, oddly in my view, that, as there were no notes taken by the members of the QRB during the actual selection process, but because the QRB members did take handwritten notes when they reconvened five months later upon the appearance of a concern over possible discrimination, this situation created an "irregularity" in the selection process. In particular, Herring asserts that a comment recorded by one of the members of the panel, that Herring had served in a position not mentioned by Herring in his written application, constitutes some proof of an irregularity in the process, because the QRB could only discuss information that was in a candidate's application. Herring provides this information as evidence that Herring's application was reviewed in an atmosphere of bias and discrimination, as well as being inaccurately portrayed in the written record of the QRB deliberations. However, it is difficult, indeed, to see how this "evidence" could have had any

adverse impact on the selection process, or on Herring's prospect for selection. The review was intended to be a remedial response to concerns about the original process. The fact that handwritten notes were taken by the QRB when they reconvened does not constitute evidence of pretext, especially is this so inasmuch as Herring does not suggest how knowledge of his performance in the unmentioned post might redound to his detriment rather than to his benefit.

iv. The Failure to Refer all Candidates for an Interview

Herring also cites QRB's failure to refer all of the candidates for interview by the selecting official as probative of pretext. QRB members stated that, after review, because a "natural break" occurred between the top two candidates and the other five, the QRB decided to forward only the top two candidates for further review. Herring received a total KSA score of 15. The applicants whose scores were forwarded to the Selecting Official received total KSA scores of 19.5 and 24. The apparent disparity between the top two candidates' scores and Herring's score is clear. Notably, Herring does not contend that he should have received a score *between* the top two; he contends he was the most highly qualified. For the reasons stated above, however, he is not entitled to have a jury second-guess that judgment on this record. Further, the practice of separating several top candidates from the rest of a candidate pool for further review is a normal practice when processing applications for a job vacancy. *See Holdcraft v. County of Fairfax*, 2002 WL 376680 (4th. Cir. Mar. 11, 2002); *Frazier v. Bentsen*, 1996 WL 445090 (4th. Cir. August 8, 1996); *Jamil v. White*, 192 F. Supp. 2d 413 (D. Md. 2002), *aff'd*, 55 Fed.Appx. 658, 2003 WL 257499 (4th Cir. February

7, 2003); *Khan v. Maryland*, 903 F. Supp. 881 (D. Md. 1995). Sending the top two candidates for interview, and certainly in the absence of any contention that Herring was discriminatorily kept out of the "top two," therefore, is not probative of pretext.

v. Comments Noting African-American Applicants

Finally, Herring asserts that comments made at the beginning of the QRB deliberations constituted evidence of racial bias during the QRB deliberation process. According to Rodriguez, one of the QRB members, another member of the QRB commented that the QRB had to be particularly careful, because there were "African-American" (or perhaps "minority") applicants. Rodriguez testified that the intent of the remark was to encourage the QRB to follow the process carefully to ensure no mistakes would be made. It is to be recalled that, in accordance with general agency policy, an EEO specialist was present for the QRB meetings, and any improper remarks or perceived bias toward any class of protected persons was to be addressed by the EEO specialist. The EEO specialist, June Johnson, an African-American, attested that to her knowledge race was not a factor in any of the QRB ratings. Manifestly, the identified comment seems to represent an effort to increase the level of care taken with regard to the deliberation process, and does not constitute evidence that racial bias infected the QRB's deliberations.

* * *

While plaintiff is understandably upset and disturbed that he did not make the Best Qualified List, and especially so in light of his repeated failures to win a promotion, Title VII is designed to remedy discrimination based on one's sex, race or other protected category,

see Langerman v. Thompson, 155 F. Supp. 2d 490, 500 (D. Md. 2001), and it "is not meant to remedy every procedural flaw that exists in an employer's selection process." *Id.* (citations omitted). The miscellany of alleged "irregularities" and "suspicious circumstances" identified by plaintiff here rise, at best, to the level of a scintilla of evidence of possible discrimination, and falls woefully short of evidence sufficient to generate a dispute of material fact as to pretext. Moreover, even coupled with the absolute minimum showing of plaintiff's prima facie case, the "totality of the evidence" does not withstand the defendant's motion for summary judgment.

IV. Conclusion

For the reasons set forth, the motion for summary judgment shall be granted.[4]

Filed: May 12, 2003

/s/
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

[4]Herring has restated his desire to depose the two applicants who were found to be best qualified. It is clear, however, that Herring has had the benefit of full discovery from all other sources of information about the promotional process he challenges here and he has been unable to generate anything other than, at most, a "patina" of possible discrimination in his workplace. Under these circumstances, I am loathe to open the door to what can only become a highly questionable and very likely abusive practice of deposing successful applicants for promotion. While employers may have to suffer the burden of litigation with every employment decision, there seems to be scant reason for the law to impose those burdens on a co-employee simply because he or she obtained a promotion that someone else coveted. Everyone in today's workplace is in a "protected class" and today's plaintiff will become tomorrow's deponent. At bottom, while I certainly commend counsel's understandable desire to be thorough and to "leave no stone unturned" in the always challenging search for evidence of intentional discrimination, especially in the public employment context and in contexts where subjective standards, i.e., "leadership ability," hold sway, there are reasonable limits that must be observed in every case. In this case, that limit will be exceeded if I permit the additional depositions sought by Herring and thus his request is denied. *See* Fed.R.Civ.P. 26(b)(2).